LUKING UDING & ORS

v.

SUPERINTENDENT OF LANDS AND SURVEYS KOTA SAMARAHAN DIVISION & ORS

HIGH COURT SABAH & SARAWAK, KUCHING
LINTON ALBERT J
[SUIT NO: 22-43-2002-I]
21 FEBRUARY 2011

NATIVE LAW AND CUSTOM: *Land dispute - Customary rights over land - Provisional lease extended to plaintiffs' land - Whether plaintiffs acquired land under native customary rights - Whether strictures of Land Code (Cap 81) Sarawak 1958 applicable - Whether plaintiffs able to prove land acquired under native customary rights - Whether testimony of witnesses supported plaintiffs' claim - Whether inclusion of plaintiffs' land in provisional lease deprived their rights to property - Whether provisional lease null and void*

EVIDENCE: *Expert evidence - Conflicting expert evidence - Analysis of aerial photographs to determine native customary land - Both expert witnesses came to different conclusions - Whether expert witnesses labouring under any constraints - Whether expert witnesses gave reasoned analysis*

The plaintiffs were residents of Kampung Merakai situated in Kota Samarahan district. They claimed that a provisional lease, issued by the 1st and 2nd defendants to the 3rd and 4th defendants as co-owners, had extended into their land acquired under Native Customary Rights ('NCR'). The 3rd and 4th defendants had ignored the plaintiffs' protest and cleared the land and destroyed the trees and crops on the land. The plaintiffs contended that they acquired NCR over the land through their ancestors who have settled in and occupied the area, known as 'pemakai menoa', which in time became an area within a defined boundary called 'garis menoa'. The plaintiffs' witnesses include those from neighbouring villages who were familiar with the 'pemakai menoa' of their respective villages. The defendants submitted that the practice to determine the status of the land before issuing a provisional lease, was by looking at aerial photographs ('D20') taken before 1954, and excluding cleared land that was subject to NCR. The aerial photographs were analysed by the defendants' witness ('DW4'), a surveyor from the Land and Survey

Department Sarawak, and the plaintiffs' witness ('PW11'), who was qualified and experienced *inter alia* in remote sensing applications for forest and land use. Both expert witnesses came to different conclusions. The plaintiffs made this claim seeking for various declaratory reliefs and orders against the defendants. The issue to be determined was whether the plaintiffs had acquired the land under NCR.

Held (allowing the plaintiffs' claim):

(1) Since the plaintiffs' claim to native land under the NCR was acquired prior to 1 January 1958, the strictures imposed by the Land Code (Cap 81) Sarawak 1958 ('Land Code') for the creation of NCR over the land, had no application. (para 16)

(2) The proof of the plaintiffs' 'pemakai menoa' was readily available from the oral testimonies of their witnesses, and showed that the plaintiffs had been in occupation within their 'pemakai menoa' since 1954. (para 19)

(3) The interpretation of PW11 was preferred over that of DW4, for unlike DW4 who was a minor functionary in the State Civil Service, PW11 was not labouring under any constraints real or imagined and had arrived at a reasoned analysis of D20. (para 20)

(4) It was clear that the plaintiffs, from the time of their ancestors, had been in occupation of their 'pemakai menoa' which followed a defined boundary based on permanent landmarks which separated Kampung Merakai from the 'pemakai menoa' of neighbouring villages. This was further supported by the witnesses from the neighbouring villages, who gave credible testimony of the long well-established 'garis menoa' delineating the 'pemakai menoa' from their respective ancestors. The plaintiffs had established on the balance of probabilities, their native customary rights to the 'pemakai menoa'. The defendants' contention, that the plaintiffs did not have customary rights over the land claimed, had no merit. (paras 21 & 22)

(5) The inclusion of the plaintiffs' land acquired under the native customary rights within the provisional lease, and the conversion of the land into an oil palm estate without their consent and without providing compensation, tantamount to

depriving them of their constitutional right to property. It followed that the provisional lease was null and void to the extent it included the plaintiffs' land acquired under the NCR. (paras 26 & 27)

Case(s) referred to:
Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal [2000] 3 CLJ 224 CA ***(refd)***
Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors [2001] 2 CLJ 769 HC ***(refd)***
Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh [2007] 6 CLJ 509 FC ***(refd)***
Superintendant Of Lands And Surveys, Bintulu v. Nor Anak Nyawai And Another Appeal [2005] 3 CLJ 555 CA ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 24
Evidence Act 1950, s. 101(1)
Federal Constitution, arts. 5, 13
Land Code (Cap 81) (Sarawak), ss. 8(1), 28

Other source(s) referred to:
Shad Saleem Faruqi, *Document of Destiny the Federal Constitution of Malaysia,* p 207

For the plaintiffs - Harrison Ngau Laing; M/s HNL & Co Advocs
For the 1st & 2nd defendants - Yap Khan Kee, State Legal Officer; AG's Chambers
For the 3rd defendant - Norida Sipek; M/s Abdul Rahim Sharkawi Razak Tready Fadillah & Co Advocs
For the 4th defendant - Ivan Hussein; M/s Ivan Hussein Advocs

Reported by Melinda Robert

JUDGMENT

Linton Albert J:

[1] The plaintiffs and those on whose behalf they are suing are residents of Kampung Merakai which is situated at Sungei Merakai, Batang Krang, Gedong in Serian/Simunjan under the Kota Samarahan Division. They claim that they have acquired native customary rights over land through their ancestors who have over the years settled in and occupied the area, the boundary of which also served as the boundary between Kampung

Merakai and several other villages which share a common boundary with Kampung Merakai. On 7 October 2000 the first and second defendants issued a provisional lease described as Lot 2979 Melikin Land District to the third and fourth defendants as co-owners part of which extended into the land acquired by the plaintiffs under Native Customary Rights. The plaintiffs contend *inter alia* that the issuance of the provisional lease to the extent that it meant the extinguishment or confiscation of their native customary rights over land which was covered by the provisional lease was wrongful because there was no provision for compensation to the plaintiffs and no compensation was given nor expected to be given. In late 2000 the third and fourth defendants, ignoring the protests and objections of the plaintiffs cleared the plaintiffs' land acquired under native customary rights and destroyed the trees and crops on this land. The plaintiffs are seeking various declaratory reliefs and orders against the defendants.

[2] The first and second defendants did not dispute the area claimed by the plaintiffs as delineated and set out in the map attached to the statement of claim but deny that the plaintiffs had acquired native customary rights over the area they claimed part of which was covered by the provisional lease. It was clear from the map attached to the statement of claim an identical version of which was admitted in evidence as exh. P13 that the plaintiffs' land acquired under native customary rights was covered by the area under the provisional lease because the map showing the provisional lease produced by the defendants namely exh. D5 clearly showed that to be the case. The first and second defendants also pleaded their reliance on s. 28(2) of the Land Code. The pleaded defences of the third and fourth defendants respectively were essentially premised on the first and second defendants' pleas.

[3] It is perhaps appropriate and useful to begin with the testimony of Nicholas Bawin Ak Anggat (PW2) whose evidence contributed to the celebrated case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769 an authority which has since been cited with approval by the Federal Court in *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509. PW2 is an ethnic Iban and sometime deputy head of the Majlis Adat Istiadat, Sarawak from

12 August 1992 to 28 February 2005, whose knowledge of Iban custom and tradition was from his personal experience and observation having been born and brought up in his longhouse and through research and study because they were documented by many well known authors like D. Freeman, Kedit, Dr. Dimbab Ngidang and Benedict Sandin just to name some. According to PW2 the Ibans constitute the biggest ethnic native group in Sarawak who have settled throughout the length and breadth of Sarawak including the whole area of Batang Krang where the plaintiffs claim to be entitled to land under native customary rights. PW2 said that native customary law, customs and traditions are synonymous and they embody the whole spectrum of their way of life, practices, rituals, ceremonies and conversations including oral tradition whereby the Ibans construct social memory relating to every aspect of their past which are relevant to the forest which included genealogies and boundary markings. These customs and traditions are not exhaustively codified. The pioneering families in the days of old would clear virgin forest for farming which established their rights to the cleared area including the forests within and around the cleared area called 'Pemakai Menoa' which in time became an area within a defined boundary called 'garis menoa' within which are the individual farms, farmlands and gardens of the inhabitants of a particular longhouse or village including communal land like cemeteries and islands of forest left uncleared for the inhabitants to collect jungle produce and obtain timber. Where there are several pioneering villages or longhouses their respective 'Pemakai menoa' are separated by defined boundaries or 'garis menoa'. Permanent landmarks would constitute those boundaries which included streams, rivers, watersheds, hills, ridges and mountains. Disputes on land boundaries or garis menoa were resolved by village chiefs and elders. Farmlands left fallow are called Temuda because the Iban practise a system of farming where farmland is left for a number of years before a particular farmland is again farmed. The right to farm temuda land is with the person who first felled the virgin forest.

[4] Nyambar Anak Suwat (PW1) the fourth plaintiff was born in Kampung Merakai in 1960 and has been residing there since. According to PW1 the total population of Kampung Merakai was 450. He said that he had three parcels of temuda land he had inherited from his father. They are situated at the tributaries of

Batang Krang. They were all damaged by the third and fourth defendants. All these parcels of temuda land are within the defined boundaries or garis menoa of Kampung Merakai. He learned about the defined boundaries or garis menoa which also constituted the borders with neighbouring villages, from their former chiefs, elders and parents and the chiefs and elders of neighbouring longhouses. Towards the end of 2000 the workers of the third and fourth defendants cleared the land within the defined boundaries or pemakai menoa and ignored their protests because the third and fourth defendants had been issued with the provisional lease. He and the other residents of Kampung Merakai depend on land in the defined boundary or, pemakai menoa, for their livelihood by way of farming, cultivation of crops and collecting jungle produce. Augustine Bagat Anak Sikut (PW5) was the headmaster of SRK Merakai at Kampung Merakai from 1974 to 1978. He is now a 62-year-old pensioner. During the time he was the headmaster of Kampung Merakai he used to join the residents there for fishing and hunting trips at their various 'pulau' areas. He came back in 2005 and also went hunting and saw that the land and farms of the residents had been cleared and planted with oil palm.

[5] Jerry Anak Suwat (PW8) is the brother of the fourth plaintiff. He said that he was born and brought up in Kampung Merakai and confirmed that the residents of Kampung Merakai are Ibans like him.

[6] Nyutan Anak Jami (PW3), a 67 year old farmer born, brought up and residing at Kampung Lebor of which he was the Chief or Tuai Rumah until 2005. One of his duties as a Chief or Tuai Rumah was to maintain the defined boundary or garis menoa between his longhouse or village and those of other longhouses or villages around his. He knew about the defined boundary or garis menoa between his longhouse and Kampung Merakai which had already been established before he was born and he knew about it from the former chiefs and elders of his longhouse and the chiefs and elders of other longhouses. PW3 described the defined boundary or garis menoa between Kampung Lebor and Kampung Merakai which is from Kuala Sungai Meringgang going upstream to Pengkalan Lebor then to Kuala Sungai Tekalong to Pulau Linang thence to Munggu Lemayong. According to PW3 custom dictates that only the inhabitants of Kampung Lebor can farm

within their defined boundary the purpose for which was to prevent disputes with other longhouses whose inhabitants' farm within their own defined boundary or garis menoa. He said that permanent landmarks such as rivers and mountains were used to demarcate the defined boundaries and names were given to these landmarks by their ancestors.

[7] Jalin Anak Mangi (PW4) is a 54 year old farmer residing at Kampong Semada Mawang and a member of its security and development committee. He described the garis menoa or defined boundary between his kampong and Kampong Merakai as being from Kuala Sungai Stapak which is a tributary of Batang Krang then to Lubok Genting which is in Ulu Sungai Tunok then to Pala Temuda Entebang then to Paya Sangkar to Bukit Tudong then to Bukit Temedak and from there to kuala Sungai Merit. His testimony relating to the purpose of the defined boundary, its creation and how he came to know about it was identical to that of PW3.

[8] Samuel Anak Tindin (PW6) is the Tuai Rumah of Kampung Pupuk Jaya Baru since 1989. He said that the defined boundary between his longhouse is from Kuala Sungai Merenga or Manga thence along Sungai Simunjan Kanan to Kuala Sungai Jitak then to Kuala Sungai Beradu or Bradu and along Sungai Simunjan Kanan to Kuala Sungai Merit. There was no dispute between the inhabitants of Kampung Pupuk Jaya Baru and Kampung Merakai whose respective inhabitants farm and cultivate land within their own defined boundary.

[9] Malana Anak Jimbai (PW7) is a 63 year old farmer and the Tuai Rumah and resident of Kampung Remun. He confirmed that there was a defined boundary between his kampong and Kampung Merakai. The defined boundary was already there when he was born and the respective inhabitants confined themselves to the area within their own defined boundary for farming and cultivation based on their custom which has prevented disputes over land between villages.

[10] Mark Bujang (PW9) who has a degree in Bachelor of Science in Geology, whose course included producing scaled geographical map, carries out community mapping in collaboration with native communities for the demarcation of land under native customary rights for various native communities based on

information given by the local natives who have an intimate knowledge of the place. His degree course included a course in Geographic Information System (GIS) which analyses geographic data. He has been producing about 50 community maps in the past five years using the GIS. PW9 was trained to use the Global Positioning System (GPS) a device for field surveys. He completed the plaintiffs' community map in 2004 from the GIS field data collected by one Nicholas Mujah (PW10) on the ground. The map so produced was admitted in evidence and marked as exh. P13.

[11] PW10 is the Secretary-General of the Sarawak Dayak Iban Association and has been to Kampung Merakai to collect data on their communal land boundary (Garis Menoa). He has attended a course and workshop in community mapping which included the use of equipment for GPS, the collection of GPS data and transfer of the data into the GIS for producing the community maps of the various native communities. The maps are used by the longhouses or villages to demarcate their communal land boundary. PW10 described 'community mapping' as follows:

> Community Mapping includes taking and recording the communal land boundary of the longhouses or villages based on information provided by the residents and elders of the longhouses or villages and the locations of the longhouses or villages, their gardens, farms, temuda, old longhouse sites (tembawai), cemetery (pendam), pulau, rivers and other landmarks within the communal land boundary of the longhouse or village. The recording of all these data or information are done with the participation of the residents and elders including the Tuai Rumah of the longhouse or village. When recording the coordinate points on the communal land boundary (antara/garis mmenua) of the longhouse or village, it is also necessary to get the participation of the people of the neighbouring or surrounding longhouses or villages so that there will be no dispute on the land boundary when the data are printed on the map of the land boundary later on. The map of the land boundary must also be shown to the respective longhouses or villages after it was printed or plotted for their confirmation of the contents of the map.

[12] PW10 said that he has been involved in community mappings for 12 other longhouses and has given evidence in several cases in the High Court relating to some. He testified that work on the community mapping relating to Kampung Merakai began in 2000 and continued in stages until 2004. PW10 described what he did at Kampung Merakai as follows:

During the Community Mapping work on the customary land of Kampong Marakai, I was assisted by a few people from Kampung Merakai. They were Nyambar anak suwat, Jerry anak Suwat, Bari anak Brian, Wilson anak Luda, Jimmy anak Uding, Ibi ak Uding, Nyutan anak Jami, Jika anak Chandang, Tama anak Tagek, Jalin anak Manggi, Buda anak Ganja, Banyang anak Nanang and Tagong anak Guyang.

The first location where I took the coordinate points of the communal land boundary of their longhouse using the GPS equipment Garmin 12XL was at Kuala Sungai Meringgang then to a place called Pengkalan Lebor and then to the confluence of Sungai Meringgang with Sungai Tekalong and then crossing in land to a place called Paya Palan Linang until we reached a place called Munggu Lemayong. And from Munggu Lemayong to Sungai Merenga (or Manga) then following sungai simunjan Kananto Sungai Jitak until Sungai Merit.

The next round of taking the coordinate points of the communal land boundary (antara/garis menua) of Kampong Marakai covered the location from Kuala Sungai Slapak (tributary of Batang Krang) to a place called Lubok Genting and then to a place called Pala temuda Entebang and then to another place called Paya Sangkar then crossing to Bukit Tudung and to Bukit Temedak then to the source of Sungai Merit then proceeding downstream until its Kuala or Nanga.

Then the final round was from the confluence of Sungai Meringgang with Batang Krang then proceeding upstream of Batang Krang until the confluence of Sungai Slapak with Batang Krang.

I also brought with me an exercise book to record each of the co-ordinates points along the communal land boundary of the longhouse. Some of these locations where I took the co-ordinates has name for identification. I recorded the name in the book too. The local residents of Kampung Merakai told me these names for rivers, hills, ridges, "tembawai" or former longhouse sites/or settlements, 'Pendam' or burial grounds, names of historical significance and others.

Apart from taking the coordinate points of the land boundary of the longhouse, I also took coordinate point of other things such as the school (SK Marakai) the longhouse Rumah Luang (Kampong Marakai) and tembawai, pendam and som farm plots.

[13] He gave all the data to PW9 who produced the community map exh. P13. PW1 confirmed that in 2004, he, together with PW8 and several others from Rumah Merakai assisted PW10 to collect data for the community map as did PW3 who together with some from his longhouse assisted PW10 in relation to the 'garis menoa' between his village and Kampung Merakai.

[14] The defendants called their witnesses but none of whom contradicted in any material particular the evidence adduced by the witnesses for the plaintiffs. Talib bin Haji Belal (DW1) is the current Superintendent of Lands and Surveys, Kota Samarahan and as such had all the powers conferred under the Land Code (Cap 81). He said that the practice is to determine the status of the land applied for by looking at aerial photographs taken before 1954 and excluding cleared land that may be subject to NCR before a provisional lease is issued. In respect of Lot 2979 Melikin Land District he confirmed that there has never been any application to his department for NCR claims by Kampung Merakai. Samuel Batok (DW2) is the Regional Manager of the third defendant and confirmed that the third defendant and the fourth defendant were jointly issued with the provisional lease described as Lot 2979 Melikin Land District containing 3880 hectares out of which only 30 hectares had not been developed by them into an oil palm plantation and harvested. He was utterly silent on the claims as to the alleged existence or non-existence of native customary land under Lot 2979 Melikin Land district, completely oblivious to the charges and counter-charges relating to native customary rights under the said provisional lease. Like DW2, Abdul Rashid bin Abdul Kassim (DW3) a manager of the Coastal Region of the third defendant was also in ignorant bliss of the charges and counter-charges relating to native customary rights over the provisional lease but confirmed that it was jointly issued to the third and fourth defendants who in turn entered into a joint venture agreement with one Kee Wee Plantation to form a joint venture company for the development of the land under the provisional lease into an oil palm plantation. DW3 testified to the virtues of the third defendant relating to compliance with the relevant Environmental Impact Assessment Study approved, no less, by the Natural Resources and Environment Board, Sarawak. Saiful Izan Kassim (DW4) a surveyor with the Lands and Survey Department, Sarawak analysed the aerial photographs, exh. D20

produced by the first and second defendants and stated that the aerial photographs taken before 1954 showed that there was a cleared area of 37 hectares under the provisional lease Lot 2979.

[15] The Federal Court has, in *Superintendent Of Land & Surveys Miri Division & Anor v. Madeli Salleh* [2007] 6 CLJ 509 laid down a definitive statement of law applicable to the determination of claims to native land under native customary rights. The clarity and unequivocality of the statement of the law make it only necessary to reproduce the relevant parts of the headnotes at pp. 511 to 514:

> (1) The proposition of law as enunciated in the two cases of *Adong Kuwau (supra)* and *Nor Ak Nyawai (supra)* reflected the common law position with regard to native titles throughout the Commonwealth ...
>
> (2) Native holdings are not only recognized by the 1920 Regulations, but where possible, such holdings may even be registered. Registration, however, is not a necessary prerequisite for such holdings to be recognized. In the light of this, it was erroneous to hold, as was held by the learned Judicial Commissioner in the present case, that the native customary rights in Sarawak were only created by s. 66 of the Ordinance. What s. 66 purported to do was to stipulate new conditions before native customary rights could be recognized after coming into force of the Ordinance. It does not purport to nullify native customary rights that had been acquired or recognized prior to the coming into force of the Ordinance. In other words, it has no retrospective force. The respondent's claim in this case arose from the circumstances which occurred prior to the Ordinance, since his father and his forefather had been in occupation of the said land prior to 1922 ...
>
> (3) On the issue of what is meant by "occupation", actual physical presence is not necessary. There can be occupation without physical presence on the land provided there exists sufficient measure of control to prevent strangers from interfering. Therefore, the fact that the respondent ceased to live on the said land prior to the fire which gutted the house on the said land in 1941 did not mean that he ceased to be in occupation of the said land ...

A (4) ...

In the absence of such a provision in the 1921 Order, the 1921 Order could not be construed to have the effect of extinguishing the rights of the native over such land which had been in existence prior to the coming into force of the 1921 Order. Such
B a drastic measure needs to be expressed in clear language and cannot be derived by mere implication...

(5) It is an established principle of statutory construction that *prima facie* a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is
C unavoidable on the language used. The 1921 Order did not seek to do so. The provisions of reg. 2, if at all, are only applicable to future occupation of the land in the reserved area but not to the existing occupiers. In short, the reservation under the 1921 Order is subject to all existing rights under the native customs of
D land tenure. It was too far reaching a consequence to construe the 1921 Order to have effect of extinguishing all existing rights that had been in existence before the coming of James Brooke ...

(7) ...

E This Court wholly agreed with the view expressed in *Adong Kuwau (supra)* and *Nor Ak Nyawai (supra)* that common law respects the pre-existence of rights under native laws or customs ...

F **[16]** Since the plaintiffs' claim to native land under native customary rights was acquired prior to 1 January 1958, the strictures imposed by the Land Code for the creation of native customary rights over land after that date have no application and do not, therefore, fall to be determined.

G **[17]** In the celebrated case of *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, Ian Chin, J after reviewing the authorities under the following propositions of law applicable to claims to land under native customary rights observed at pp. 776-777:

H

A pemakai menoa (also spelt pemakai menua), is an Iban term that refers to "a territorial domain of a longhouse community where customary rights to land resource was created by pioneering ancestors" (Dr Dimbab Ngidang on *Ethical Values of Sarawak Ethnic Groups*, p 33). Another description of it is in these
I words: "The family groups (bilek) join together to make a longhouse which, with the surrounding contiguous territory, make

> up the menoa. It includes besides farms and gardens, the water that runs through it and the forest round about it to the extent of half a day's journey" (AJN Richards on the *The Land Law and Adat*, p 24). Such a territory is chosen because of the presence of arable land, of rivers and forests from the which life sustaining resources like water, fish, animals and forest products (including timber, wild vegetables, edible ferns, palm shoots, rattans, herbs or medicinal plants, fruit trees and bamboo) can be obtained. The evidence of the plaintiffs supports this and I need not go into them since that is not disputed. The pioneers of a longhouse community are usually relatives who banded together in search of a new territory and when this is found, the pioneers would build a longhouse with sufficient rooms arranged in a row, all joined together to accommodate the families. The longhouse will just expand with new families. It is within this territory, called the pemakai menoa, that each longhouse community has access to land for farming, called the temuda, to rivers for fishing and to jungles, called galau or pulau galau, for the gathering of forest produce. It has boundary separating it from that of another longhouse. The boundary is reckoned by the reference to mountains, ridges and rivers or other permanent features on the earth ...

[18] The propositions of law laid down by Ian Chin, J remain good law even though the case was overturned on appeal because it was overturned on the basis that the learned judge there was wrong in his finding that the plaintiffs had established their customary rights. Hashim Yusoff, JCA (as he then was) delivering the judgment of the Court of Appeal in *Superintendant Of Lands And Surveys, Bintulu v. Nor Anak Nyawai And Another Appeal* [2005] 3 CLJ 555 said at pp 573-575:

> The question therefore is whether the learned judge was factually correct based on the evidence adduced.
>
> ...
>
> ... Hence, to say that the area was within the 'pemakai menoa' of the respondents without any credible evidence to support it would therefore be factually erroneous.
>
> ...
>
> ... Having said that, we must hasten to add that this case should not necessarily be a precedent for other potential claims where proof may be readily available. ...

[19] In this action, quite apart from proof established by exh. P13, proof of the plaintiff's pemakai menoa was readily available from the oral testimonies of their witnesses which are adumbrated above coupled with the evidence of DW4 who was understandably untruthful as to the size of the cleared are of 38 hectares, nevertheless, showed that the plaintiffs had been in occupation within their pemakai menoa since 1954. In his analysis of the photographs under exh. D20, Claus-Peter Gross (PW11) Ph. D and Diploma in Forestry whose qualifications and experience encompass remote sensing applications for forest and land use inventories, environmental monitoring, thematic mapping, image interpretation, establishment of GIS database, training of experts, project management, project evaluation in more than ten countries, gave the following conclusions:

Aerial photo interpretation 1954

Polygon features		
Primary Forest		4153 ha
Disturbed Forest		395 ha
Poor Forest		17 ha
Regeneration Forest / Shrubs		225 ha
Clearing / Agriculture		437 ha
	Sum	5327 ha
Line features		
1 Longhouse		40 m

[20] I have no hesitation in preferring the interpretation of PW11 over that of D4 not least because unlike DW4 who was a minor functionary in the State Civil Service PW11 was not labouring under any constraints real or imagined and arrived at a reasoned analysis of the aerial photographs in D20. I do not think that the plaintiffs have fallen afoul of the observation of Hashim Yusoff, JCA (as he then was) in *Superintendent Of Lands And Surveys, Bintulu v. Nor Anak Nyawai (supra)* at p. 570 which is relied on by learned counsel for the first and second defendants:

> From the above two cases, we note that the common feature which forms the basis of claim for native customary rights is the continuous occupation of land. Further, we are inclined to agree with the view of the learned trial judge in *Sagong bin Tasi & Ors*

> that the claim should not be extended to areas where 'they used to roam to forage for their livelihood in accordance with their tradition'. Such view is logical as otherwise it may mean that vast areas of land could be under native customary rights simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search for food.

[21] It was never remotely suggested that the plaintiffs and their ancestors had 'roamed or foraged' the areas in their 'pemakai menoa' in search of food. It was clear that the plaintiffs from the time of their ancestors had been in occupation of their 'pemakai menoa' which followed a defined boundary based on permanent landmarks which separated Kampung Merakai from the 'pemakai menoa' of neighbouring villages whose own 'pemakai menoa' were contiguous to that of Kampung Merakai and witnesses from these other villages gave credible testimony of the long established 'garis menoa' delineating the 'pemakai menoa' from their respective ancestors. Thus, applying the principles I have set out to the evidence adduced by the plaintiffs and the defendants adumbrated I am satisfied that it is more probable than not that the plaintiffs have established their native customary rights to the 'pemakai menoa' which they claim, in accordance with the civil standard of proof required under s. 101(1) of the Evidence Act 1950 which states:

> Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

[22] In the circumstances, the defendants' contention that the plaintiffs do not have customary rights over the land claimed or that the same falls outside the provisional lease are demolished because quite apart from the precise delineation set out in exh. P13, the description of the plaintiffs' 'pemakai menoa' given by their witnesses contain sufficient particulars to demarcate the plaintiffs' 'pemakai menoa' with the degree of certainty to sustain their claim over the 'pemakai menoa' which is clearly within part of the provisional lease issued to the 1st and 2nd defendants under Lot 2979 Melikin Land District. The other pleas relied on variously by the defendants are s. 28 of the Land Code and the Melikin Land District (Mixed Zone Land) Declaration Order 1998. Section 28 provides:

A (1) No State land shall be alienated under this Code unless and until the survey of the land has been completed to the satisfaction of the Superintendent:

Provided that, when the immediate survey of any State land is impracticable, the Superintendent may order that a
B provisional lease in Form C in the First Schedule be executed in favour of the person entitled.

(2) Every provisional lease shall specify the approximate extent and area of the land included therein but shall not entitle the holder to a grant or lease of the whole of the area specified.
C

[23] It is argued for the defendants that pursuant to the above provisions when the lease is subsequently granted or issued the plaintiffs' claim to native customary land under native customary rights would be excluded from the lease. There is no merit to this
D argument because it is akin to locking the stable door after the horse has bolted. The argument premised on the latter plea is to the effect that no land subject to native customary rights can exist because the area under the provisional lease has been declared a mixed zone area, is equally devoid of merit as it is no different
E from putting the cart before the horse with its backside forward. Without the requisite extinguishment of the pre-existing acquisition of land under native customary rights, the declaration of the area under mixed zone land is woefully ineffectual.

F **[24]** It is patently clear that the issuance of the provisional lease Lot 2979 Melikin Land District to the 3rd and 4th defendants covered an area which includes land owned by the plaintiffs under native customary rights well before the existence of the Land Code under which the provisional lease was issued violates arts. 5
G and 13 of the Federal Constitution.

Article 5 reads:

(1) No person shall be deprived of his life or personal liberty save in accordance with law.

H

and

Article 13 reads:

(1) No person shall be deprived of property save in accordance with law.
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(2) No law shall provide for the compulsory acquisition or use of property without adequate compensation.

[25] In *Lembaga Tatatertib Perkhidmatan Awam Hospital Besar Pulau Pinang & Anor v. Utra Badi K Perumal* [2000] 3 MLJ 281 it was held that the right to life includes the right to livelihood. In *Nor Anak Nyawai & Ors v. Borneo Pulp Plantation Sdn Bhd & Ors* [2001] 2 CLJ 769, native customary rights were regarded as part of the right to livelihood (see *Document of Destiny the Federal Constitution of Malaysia* by Shad Saleem Faruqi at p. 207).

[26] The inclusion of the plaintiffs' land under native customary rights within the provisional lease and the conversion of all but 30 hectares of the area under the provisional lease into an oil palm plantation without the consent of the plaintiffs and devoid of any compensation whatsoever make it unarguable that the plaintiffs have been deprived of their constitutional right to property. Land is intricately and inextricably part of the Iban way of life upon which they depend for their existence and taking it away from them without compensation means depriving them of their very existence. The provisional lease issued to the 3rd and 4th defendants, to the extent that it included land on which the plaintiffs had acquired native customary rights also contravenes s. 8(1) of the Land Code because the 4th defendant was a non-native and as such "may not acquire any rights or privileges whatever over native customary land ...".

[27] In the circumstances, it follows that the provisional lease is null and void in so far as it purports to include land in respect of which the plaintiffs have established native customary rights over. (See s. 24 Contracts Act 1950).

[28] For the reasons aforesaid it is accordingly declared and ordered as follows:

(1) That the plaintiffs have acquired native customary rights over land described in para. 1(c) of the re-amended statement of claim and the same has never been extinguished by the 1st and/or the 2nd defendants.

(2) The issuance of the said lease in respect of parcel/Lot No. 2979 Melikin Land District to the 3rd and 4th defendants, in so far as it covers or includes or impairs the plaintiffs' rights over the said native customary land therein was null and void;

A (3) That the 1st and 2nd defendants within 30 days rectify the provisional lease Lot 2979 Melikin Land District by excluding the plaintiffs' native customary land as aforesaid from the area covered under the provisional lease Lot 2979 Melikin Land District;

B (4) Damage to the plaintiffs occasioned by the provisional lease Lot 2979 Melikin Land District be assessed by the Deputy Registrar and paid by the 3rd and 4th defendants with interest at 8% per annum from the date of the writ until full payment;

C (5) Costs to the plaintiffs to be taxed unless agreed;

(6) There shall be no order as to exemplary or aggravated damages as the same was not established;

D (7) That the 3rd and 4th defendants, their servants, agents assigns and successors be and is hereby restrained from entering, clearing or carrying out any works howsoever or any purpose whatsoever on the plaintiffs' native customary land aforesaid or any part thereof.

E Order accordingly.

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